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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 4

STEVEN MARLOWE,

Plaintiff and Appellant,

v.

DEPARTMENT OF MOTOR VEHICLES,

Defendant and Respondent.

A123327

(Contra Costa County Super.
Ct. No. CIVMSN08-0690)

Steven Marlowe appeals from an order denying his petition for writ of mandate to set aside the Department of Motor Vehicle's (DMV) order suspending his license. Marlowe contends he did not refuse to consent to a chemical test. (Veh. Code,¹ § 13353.) We affirm.

I. FACTUAL BACKGROUND

Officer T. Henderson of the Danville Police Department stopped the car Marlowe was driving after it failed to stop at a stop sign.² Henderson smelled alcohol on Marlowe's breath, and noticed that his eyes were red and glassy and his speech was slow and slightly slurred. Henderson conducted field sobriety tests, determined Marlowe was under the influence of alcohol, and arrested him. Marlowe refused to provide a breath

¹ All further statutory references are to the Vehicle Code.

² The facts regarding the traffic stop are taken from Henderson's written report.

sample at the scene. Henderson told him he would have to submit to a chemical test. Marlowe first told Henderson he did not want to take the test; when told he needed to decide which type of test to take, he said he did not understand. Henderson took Marlowe to the Danville Police Department.

At the station, Henderson asked Marlowe for his Social Security number and the city where he was born.³ Marlowe responded that he did not understand “why you guys are doing this.” He continued to say he did not understand in response to further statements and questions, including where he was born.

Henderson then advised Marlowe that he was required to submit to a chemical test as follows: “Okay, Mr. Marlowe, you’re required by State law to submit to a chemical test to determine your alcohol—the alcohol and/or blood—drug content in your blood. If it’s believed you’re under the influence of alcohol, you have a choice to take a breath or a blood test. [¶] If you refuse to submit to or fail to complete a test, your driving privilege will be suspended for one year or revoked for two to three years. . . . You do not have the right to talk to an attorney or have an attorney present before stating whether you will submit to a test, before you take—before you decide which test to take or during the test. If you cannot or state you cannot complete a test you choose, you must submit and complete the remaining test.”

Henderson then asked Marlowe if he would take a breath test. Marlowe replied, “I’m not refusing anything. I don’t understand. I’m not saying I refuse. I’m saying I don’t understand. That’s a lot of legal verbiage. I don’t have an attorney here, I don’t understand. I’m not refusing, I’m not—” Another officer asked Marlowe if he would cooperate with the nurse who was to take his blood. Marlowe answered, “I am not going to beat anybody up or jump up and down or yell and scream. [¶] I don’t want to do it, but I’m not refusing, but I don’t understand. I don’t get it.” Henderson told Marlowe that saying he did not “want to do it” was a refusal, and Marlowe repeated that he did not

³ Exhibit 1 to Marlowe’s petition for writ of supersedeas filed in this appeal contains both a DVD recording of the events at the police station and a transcript of the DVD.

understand. The other officer told Marlowe, “if you tell us that this gentleman can take your blood, then you are not refusing,” and Marlowe reiterated that he was not refusing but did not understand. He continued to use this formula several more times in response to further questions and statements by the officers, including the question, “Will you give a blood sample?” and the follow-up question, “Yes or no?” He did not resist when the nurse approached, and his blood was drawn without incident.

The DMV suspended Marlowe’s driving privilege for a year for his refusal to submit to a chemical test. (§ 13353, subd. (a).) After an administrative hearing, the DMV upheld the suspension. Marlowe petitioned the superior court for a writ of mandate to set aside the DMV’s order suspending his license. The superior court denied Marlowe’s petition for a writ of mandate, finding that the weight of the evidence showed Marlowe had refused to submit to a chemical test. This appeal ensued.

II. DISCUSSION

Marlowe contends the court erred in finding that he refused to submit to a chemical test. When reviewing a petition for a writ of mandate following an order of suspension, the trial court exercises its independent judgment to determine whether there was sufficient evidence to support the administrative decision. (*Lake v. Reed* (1997) 16 Cal.4th 448, 456.) On appeal, we review the trial court’s factual findings for substantial evidence. (*Id.* at p. 457; *Morgenstern v. Department of Motor Vehicles* (2003) 111 Cal.App.4th 366, 372 (*Morgenstern*).) However, where there is no disputed question of fact, we review de novo the question of whether a driver’s actions constituted a refusal to take a blood test as a matter of law. (*Carrey v. Department of Motor Vehicles* (1986) 183 Cal.App.3d 1265, 1270 & fn. 2 (*Carrey*); *Morgenstern. supra*, 111 Cal.App.4th at p. 372.)

Section 23612, subdivision (a)(1)(A), the implied consent law, provides: “A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of Section 23140, 23152, or 23153.” A person who is arrested for driving under the

influence of alcohol and who refuses to submit to a test after being requested by the officer will have his or her driving privilege suspended. (§ 13353, subd. (a).) The person must be informed of the consequences of failure to submit to the test. (§ 23612, subd. (a)(1)(D).)⁴

In deciding whether a motorist has refused to submit to a chemical test, the determining factor is not the driver's state of mind, but the fair meaning to be given to his response. (*Maxsted v. Department of Motor Vehicles* (1971) 14 Cal.App.3d 982, 986.) "[T]he driver should clearly and unambiguously manifest the consent required by the law. Consent which is not clear and unambiguous may be deemed a refusal." (*Carrey, supra*, 183 Cal.App.3d at p. 1270.) Submitting to a test under protest constitutes a refusal, and the fact that a driver submits to the test without physical resistance is immaterial. The initial refusal is the basis for the suspension. (*Payne v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 1514, 1518-1519.)

We agree with the trial court that Marlowe's responses were at best ambiguous, and that he did not give clear consent to a chemical test. The language of the admonition Henderson gave was "unambiguous on its face." (*Jones v. Department of Motor Vehicles* (1977) 71 Cal.App.3d 615, 618-619.) Our review of the DVD shows that Marlowe was articulate and able to communicate. However, he repeatedly asserted he did not understand virtually anything the officers said to him, including simple questions about whether he would take a chemical test, instead stating that while he was not refusing, he did not understand. The officers were not required to engage in "semantic gamesmanship" with him. (*Morgan v. Department of Motor Vehicles* (1983) 148 Cal.App.3d 165, 170.) Rather, he was required to express his consent clearly. (*Carrey, supra*, 183 Cal.App.3d at p. 1270.) He did not do so, and the DMV properly treated his evasive and ambiguous responses as a refusal.

⁴ Because the record does not indicate Marlowe was advised of the consequences of refusing to take the test in the field, we shall rely for our analysis on the statements Marlowe made after he received the full admonishment at the police station. These statements were recorded on a DVD, which we have reviewed.

III. DISPOSITION

The judgment is affirmed.

RIVERA, J.

We concur:

RUVOLO, P.J.

REARDON, J.